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No. 552

In the Supreme Court of the United States

OCTOBER TERM, 1930

WILLIAM W. McBOYLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The majority and dissenting opinions in the Circuit Court of Appeals (R. 171, 176) are published in 43 F. (2d) 273, 276.

JURISDICTION

The judgment sought to be reviewed was entered on September 8, 1930. (R. 177.) The petition for certiorari was filed in this Court on November 17, 1930. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether an airplane is a "motor vehicle" within the meaning of the National Motor Vehicle Theft Act;

2. Whether petitioner was triable in the Western District of Oklahoma;

3. Whether the trial court erred in overruling petitioner's motion for a new trial.

STATUTE INVOLVED

The National Motor Vehicle Theft Act (Act of October 29, 1919, c. 89, 41 Stat. 324, 325; U. S. C. Title 18, Sec. 408), so far as pertinent, provides:

> SEC. 2. That when used in this Act:
>
> (a) The term "motor vehicle" shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails;
>
> (b) The term "interstate or foreign commerce" as used in this Act shall include transportation from one State, Territory, or the District of Columbia, to another State, Territory, or the District of Columbia, or to a foreign country, or from a foreign country to any State, Territory, or the District of Columbia.
>
> SEC. 3. That whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by

a fine of not more than $5,000, or by imprisonment of not more than five years, or both.

* * * * *

SEC. 5. That any person violating this Act may be punished in any district in or through which such motor vehicle has been transported or removed by such offender.

STATEMENT

Petitioner was convicted in the United States District Court for the Western District of Oklahoma under an indictment charging him and another with transporting from Ottawa, Illinois, to Guymon, Oklahoma, an airplane which they knew had been stolen. (R. 2, 5.) Petitioner was sentenced to serve three years' imprisonment and to pay a fine of $2,000. (R. 9.) The Circuit Court of Appeals for the Tenth Circuit, one judge dissenting, affirmed the judgment of conviction. (R. 176.)

The evidence for the Government (R. 13 *et seq.*) tended to establish, among other things, that petitioner, the owner of a commercial airport at Galena, Illinois, induced an aviator in his employ to go to Ottawa, Illinois, and steal an airplane belonging to another concern. Upon the arrival of the plane at petitioner's field, petitioner changed the plane's serial number and painted it over in order to conceal the alteration. Petitioner then gave his aviator $150 as expense money and directed him to fly the stolen plane to Amarillo, Texas. Peti-

tioner kept in touch with the aviator *en route* through prearranged code telegrams. When the plane reached Guymon, Oklahoma, petitioner instructed the aviator to sell or store the plane and return to Galena.

ARGUMENT

I

While the question whether an airplane is a "motor vehicle" within the meaning of the National Motor Vehicle Theft Act is not free from doubt, we submit that the better view is that held by the majority opinion in the Circuit Court of Appeals. That court said (R. 172–174):

> The primary question is whether an airplane comes within the purview of the National Motor Vehicle Theft Act. This act defines the term "motor vehicle," as follows:
>
> "The term 'motor vehicle' when used in this section shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self propelled vehicle not designed for running on rails."
>
> Counsel for McBoyle contend that the word "vehicle" includes only conveyances that travel on the ground; that an airplane is not a vehicle but a ship; and that, under the doctrine of ejusdem generis, the phrase "any other self-propelled vehicle" can not be construed to include an airplane.
>
> The Century dictionary gives the derivation of the word "vehicle" as follows, "F. Vehicule, L. Vehiculum," meaning a "con-

veyance, carriage, *ship.*" It defines the word as, "Any receptacle, or means of transport, in which something is carried or conveyed or *travels.*" (Italic ours.)

It will be noted that the Latin word "vehiculum" means a ship as well as a carriage.

Webster defines the word "vehicle" as follows:

"(1) That in or on which any person or thing is or may be carried, esp. on land, as a coach, wagon, car, bicycle, etc.; a means of conveyance.

"(2) That which is used as the instrument of conveyance or communication."

Corpus Juris, Vol. 42, page 609, Sec. 1, defines a motor vehicle, as follows:

"A 'motor vehicle' is a vehicle operated by a power developed within itself and used for the purpose of carrying passengers or materials; and as the term is used in the different statutes regulating such vehicles, it is generally defined as including all vehicles propelled by any power other than muscular power, except traction engines, road rollers, and such motor vehicles as run only upon rails or tracks."

Both the derivation and the definition of the word "vehicle" indicate that it is sufficiently broad to include any means or device by which persons or things are carried or transported, and it is not limited to instrumentalities used for traveling on land, although the latter may be the limited or

special meaning of the word. We do not think it would be inaccurate to say that a ship or vessel is a vehicle of commerce.

An airplane is self-propelled, by means of a gasoline motor. It is designed to carry passengers and freight from place to place. It runs partly on the ground but principally in the air. It furnishes a rapid means of transportation of persons and comparatively light articles of freight and express. It therefore serves the same general purpose as an automobile, automobile truck, or motorcycle. It is of the same general kind or class as the motor vehicles specifically enumerated in the statutory definition and, therefore, construing an airplane to come within the general term "any other self propelled vehicle," does not offend against the maxim of ejusdem generis.

Furthermore, some meaning must be ascribed to the general phrase "any other self propelled vehicle," which Congress wrote into the Act. It specifically enumerated all of the known self-propelled vehicles designed for running on land. It used the word "automobile," a generic term, which includes all self-propelled motor vehicles that travel on land and are used for the transportation of passengers, except those designed for running on rails. 42 C. J. p. 609, Sec. 2.

We conclude that the phrase "any other self propelled vehicle" includes an airplane,

> a motor boat and any other like means of conveyance or transportation which is self-propelled, and is of the same general class as an automobile and a motor cycle.

The rules of construction to which petitioner refers in his brief (pp. 19 and 20) are not decisive of the question involved. They are but aids in determining the meaning of the statute. *Ash Sheep Company* v. *United States,* 252 U. S. 159, 170; *Mason* v. *United States,* 260 U. S. 545, 554. The decisive factors would seem to be that the phrase "any other self-propelled vehicle not designed for running on rails" is broad enough to include an airplane and that unless it is given such a construction the phrase is well-nigh meaningless. Petitioner's contention (Br., p. 22) that the phrase is a mere "catch-all" to include "any new trade or coined names that might be applied to" automobiles and motor cycles is not convincing.

II

Petitioner also contends that he was not triable in the Western District of Oklahoma where the plane was taken *en route* to Texas, its ultimate destination, because he did not personally take the plane there nor direct his aviator to take it there.

The point was thus disposed of by the Circuit Court of Appeals (R. 174):

> The crime of transporting a stolen motor vehicle in interstate commerce is a continuing offense. It is committed in each state

and district through which such vehicle is transported. It was not essential that McBoyle should have been physically present in the Western District of Oklahoma. The constitutional requirement is that the accused shall be tried in the state or district where the crime is committed, but not necessarily in the state and district where the accused was at the time the crime was committed. It is sufficient if the crime was committed in the Western District of Oklahoma and McBoyle caused it to be committed there.

Salinger v. *Loisel*, 265 U. S. 224, 235; *Burton* v. *United States*, 202 U. S. 344, 387; *In Re Palliser*, 136 U. S. 257, 265–268.

The jury was warranted in finding, from the evidence, that McBoyle caused Lacey to undertake to transport such airplane from Ottawa, Illinois, to Amarillo, Texas, that Lacey started from Ottawa and succeeded in flying as far as Guymon, Oklahoma, and that, upon telegraphic instructions from McBoyle, Lacey stored the airplane at Guymon and returned to Galena; and in concluding that McBoyle caused the offense to be committed in the Western District of Oklahoma.

See also *Millette* v. *United States*, 4 F. (2d) 635 (C. C. A. 7th), and cases cited.

Petitioner cites no decisions in support of his contention, and his theory overlooks the principle of criminal agency. He directed the theft of the plane in Illinois and its transportation to Texas.

In the absence of instructions by the petitioner, the aviator obviously had to choose his route. See *Wilson* v. *United States*, 232 U. S. 563, 567.

III

The overruling of petitioner's motion for a new trial is not reviewable. *Pickett* v. *United States*, 216 U. S. 456, 461. Furthermore, the Circuit Court of Appeals "examined the record and [was] convinced that the trial court did not abuse its discretion in denying" the motion. (R. 176.)

CONCLUSION

We submit that the decision below was correct, although the matter is not free from doubt. The case presents no conflict with any other decision. The petition should be denied.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
CLAUDE R. BRANCH,
NUGENT DODDS,
Special Assistants to the Attorney General.
HARRY S. RIDGELY,
W. MARVIN SMITH,
Attorneys.

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